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Beltman, Daan; Kalverboer, Margrite; Zijlstra, Elianne; van Os, Carla; Zevulun, Daniëlle

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# **The Legal Effect of Best-Interests-of-the-Child Reports in Judicial Migration Proceedings: A Qualitative Analysis of Five Cases**

Daan Beltman, Margrite Kalverboer, Elianne Zijlstra, Carla van Os, Daniëlle Zevulun

## ***Abstract***

*In 2006 the Study Centre for Children, Migration and Law began research on a method for diagnostic assessments of, and reporting on, the best interests of the child in migration law cases. The reports, which are based on the Best Interests of the Child Model of Kalverboer and Zijlstra (2006) and which are drawn up in line with General Comment No. 14 of the United Nations Committee on the Rights of the Child, currently fill a gap in Dutch migration law and administrative practice regarding the state's obligation under international law to take the best interests of the child into account in every decision concerning children. This chapter presents the preliminary results of a qualitative analysis of the legal effect of submitting the assessment reports by lawyers in Dutch judicial migration proceedings. The reports strengthen the relevant appeal procedures, although the child depends on a lawyer who is able to make a good transposition of social-behavioural expert opinions into legal terms. The reports also enhance compliance with the CRC. However, the best interests of children are not necessarily fairly balanced. Here, General Comment No. 14 may offer an opportunity for lawyers further to substantiate the best interests of the child.*

## **1 Introduction**

It can be said that the situation of children has generally improved in the 25 years since the United Nations Convention on the Rights of the Child (CRC) was adopted, especially in that the CRC obligates states to take the best interests of the child into account in decision-making which involves children. However, it was not until 2013 that the United Nations Committee on the Rights of the Child (UN Children's Rights Committee) threw light on the question of how the principle of the best interests of the child – sometimes regarded as a vague concept open to abuse<sup>1</sup> – must be assessed and determined.<sup>2</sup> Thus, it may be anticipated that in the next 25 years children will be even better off than before. The study recounted in this chapter considers the extent to which such an improvement could be achieved in the field of migration law.

### **1.1 Background of the study**

Children are a vulnerable group, even more so those in migration. When the latter enter a host country, with their parents or alone (as an unaccompanied<sup>3</sup> or separated<sup>4</sup> minor), in search of

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<sup>1</sup> See, for example, Charlow A 'Awarding custody: the best interests of the child and other fictions' (1987) 5 *Yale Law & Policy Review* 267.

<sup>2</sup> Council of Europe *Conclusions of the European Conference on the 'Best Interests of the Child' within the framework of the 25th anniversary of the United Nations Convention on the Rights of the Child* (2015) 4.

<sup>3</sup> 'Unaccompanied children (also called unaccompanied minors) are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members'; UNICEF *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (2004).

protection, they may have suffered persecution, starvation, (sexual) violence, war and so on, in their country of origin, in the country they came from and/or during their flight to Europe. Many of them contend with post-traumatic stress, anxiety, fear and/or depression.<sup>5</sup> In the best interests of the development of the (vulnerable) child, which is guaranteed by article 6 (the right to life and development) in conjunction with article 3 (the best interests of the child) of the CRC, it is essential that the host country provides child-friendly treatment for children entering the country in search of protection. Such treatment should apply in both legal theory and administrative practice: given that a highly vulnerable group of migrants is at issue, a legal approach alone to taking into account the best interests of the child in a decision-making procedure is not sufficient. Therefore, in its General Comment No. 14 (on art. 3 CRC) the UN Children's Rights Committee prescribes a multidisciplinary approach involving professionals who have expertise in matters related to child and adolescent development.<sup>6</sup>

## 1.2 The Study Centre for Children, Migration and Law

To overcome the gaps between the legal theory and administrative practice with regard to decision-making in migration procedures concerning children, the Study Centre for Children, Migration and Law of the University of Groningen (Study Centre) has worked since 2006 as a multidisciplinary team carrying out social behavioural scientific diagnostic assessments of the best interests of the child at the request of lawyers or other legal representatives<sup>7</sup> (hereafter, lawyer). The assessment is conducted using the 'Best Interests of the Child' (BIC) method,<sup>8</sup> developed from a 'Best Interests of the Child' model.<sup>9</sup> A social behavioural scientific *pro*

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<sup>4</sup> 'Separated children are those who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so; UNICEF *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (2004).

<sup>5</sup> Henley J & Robinson J 'Mental health issues among refugee children and adolescents' (2011) 15(2) *Clinical Psychologist* 51-62; Montgomery E & Foldspang A 'Validity of PTSD in a sample of refugee children: can a separate diagnostic entity be justified?' (2006) 15 *International Journal of Methods for Psychiatric Research* 64-74; Heptinstall E, Sethna V & Taylor E 'PTSD and depression in refugee children' (2004) 13(6) *European Child & Adolescent Psychiatry* 373-80.

<sup>6</sup> See under no. 94, available at [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf) (accessed 29 January 2016).

<sup>7</sup> For instance, legal counsellors of the Dutch Refugee Council or guardians of Nidos, the Dutch guardianship institution for unaccompanied minors.

<sup>8</sup> Zijlstra AE, Kalverboer ME and Post WJ et al. 'Could the BIC-Q be a decision support tool to predict the development of asylum-seeking children?' (2013) 36 *International Journal of Law and Psychiatry* 129-35. The BIC method globally entails: an interview with the child and his or her parents/guardians; an observation of the child (and his or her parents/guardians) during the interview; interviews with professionals, such as physicians, teachers, caregivers and social workers, who work in the child's environment; the use of standardised instruments to identify the social-emotional development of the child and the child-rearing environment. By making use of the BIC-method in a specific case, the Study Centre, following a (diagnostic) assessment, first identifies all the interests of the child involved and subsequently determines the best interests.

<sup>9</sup> Kalverboer ME & Zijlstra AE *Het Belang van het Kind in het Recht* [The best interests of the child in law] (2006); Zijlstra AE *In the Best Interest of the Child: A Study into a Decision-Support Tool Validating Asylum-Seeking Children's Rights from a Behavioural Scientific Perspective* (doctoral thesis, University of Groningen 2012). The BIC model is based on behavioural scientific research and contains a list of 14 developmental conditions which should be present in the environment in which the child is raised to ensure a present and future in which, in the best interests of the child, the child's right to development is fully guaranteed. The following conditions can be identified: adequate physical care; safe immediate physical environment; affective atmosphere; supportive, flexible child-rearing structure; adequate example by parents; interest shown in the child; present and

*justitia* assessment report (assessment report) is drawn up on the basis of such an assessment, and submitted by lawyers as an expert opinion on the best interests of the child in administrative and/or judicial migration proceedings.<sup>10</sup>

### 1.3 Purpose of study and chapter outline

This chapter presents a practice-based assessment of the legal effect of an intervention to overcome a shortcoming in an existing procedure,<sup>11</sup> with the focus on judicial migration proceedings before courts of first instance.<sup>12, 13</sup> A preliminary case study of five cases was conducted as part of a larger study of 25 cases,<sup>14</sup> providing new results<sup>15</sup> regarding nearly ten years of reporting by the Study Centre.

The main question of this case study is: What are the legal effects of submitting a determination of the best interests of the child, as included in an assessment report, to a court? The sub-questions are: (1) How does the lawyer submit and convert the assessment report to the court in his or her grounds for the appeal; and (2) How does the court respond to those grounds, in particular to the assessment report?

To set the legal context, section 2 of this chapter briefly elaborates on Dutch migration procedures and judicial migration proceedings concerning children. Section 3 describes the study's research method, after which the analysis in section 4 discusses the way in which the assessment reports are dealt with by lawyers and interpreted in the courts' judgments. The final section presents the results of this preliminary case study and answers the main and sub-questions.

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future continuity in upbringing conditions; safe wider physical environment; respect; social network; education; contact with peers; adequate role-models in society; and present and future stability in life circumstances.

<sup>10</sup> Earlier, Kalverboer and Beltman suggested that in future this temporary function of the Study Centre could be taken over by the Child Care and Protection Board (which is part of the Dutch Ministry for Security and Justice). See Kalverboer ME & Beltman D 'General Comment nummer 14 in vreemdelingenprocedures: de toepassing van General Comment 14 van het VN-Kinderrechtencomité ter doorbreking van de impasse ten aanzien van het "belang-van-het-kind"-beginsel in vreemdelingenprocedures' [General Comment number 14 in aliens procedures: the implementation of General Comment number 14 of the UN Children's Rights Committee to overcome the deadlock with regard to the "best interests of the child"-principle in aliens procedures] (2014) 7-8 *Tijdschrift voor Familie- en Jeugdrecht* 187-193.

<sup>11</sup> Cf. Van Loon D, Van der Meulen B & Minnaert A *Effectonderzoek in Gedragwetenschappen: Methodologische Moeilijkheden en Mogelijkheden* [Impact research in behavioural sciences: methodological difficulties and opportunities] (2011).

<sup>12</sup> For more information on the Dutch district courts, see <https://www.rechtspraak.nl/English/Judicial-System/Pages/District-courts.aspx> (accessed 29 January 2016).

<sup>13</sup> A study of the legal effect of submitting the assessment reports in the first-instance procedure is planned.

<sup>14</sup> Beltman D et al. (in progress) 'The Legal Effect of Best-Interests-of-the-Child Reports in Judicial Migration Proceedings: From social scientific evidence to legal and judicial implementation' (provisional title).

<sup>15</sup> Kalverboer ME et al. published in 2011 a preliminary study on the legal effect of submitting assessment reports in the administrative decision-making procedure. See Kalverboer ME, Zijlstra AE, Ten Brummelaar MDC et al. 'Children first? The significance of child-oriented social welfare reports for legal decision-making in asylum procedures' (2011) 14(1) *International Journal of Child and Family Welfare* 2-18.

## 2 Legal framework

### 2.1 Different kinds of migration procedures for children

In the Netherlands several legal procedures exist in the field of migration law. The two main procedures that can be distinguished are the asylum and the managed migration procedure (or ‘regular procedure’). Children who seek asylum in order to receive protection as a refugee (according to the 1951 Convention relating to the Status of Refugees) should apply for a residence permit in the asylum procedure, while other migrant children, such as those wishing to reside in the Netherlands for the purposes of family reunification, must follow the managed migration procedure.<sup>16</sup> Each procedure has its own set of procedural and substantive policy rules.

#### 2.1.1 Migration procedures for children seen from a procedural viewpoint

In the current migration procedures, hardly any special procedural regulations exist with regard to children.<sup>17</sup> In the Netherlands the General Administrative Law Act (GALA) generally applies to migration law procedures as well as judicial migration proceedings.<sup>18</sup> From a procedural perspective, after the Immigration and Naturalisation Service (IND) takes a decision in which it either grants a residence permit or rejects the application, the migrant child (separately or as part of a family) has the possibility to appeal against this decision at the aliens division of the court.<sup>19</sup> The migrant child’s lawyer then submits a notice of appeal including the grounds for the appeal. If the appeal has been submitted in conformity with the procedural standards,<sup>20</sup> the court renders a judgment in which the appeal is declared well-founded or unfounded.

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<sup>16</sup> Special policy regulations exist for unaccompanied minors (para. B8/6 Aliens Circular), children who have been staying in the Netherlands for more than five years (para. B9/6 Aliens Circular), and for ‘westernised’ Afghan girls (para. B8/10 Aliens Circular). Furthermore, children may apply for a residence permit for victims of human trafficking (paras. B9/10 and B9/12 Aliens Circular) or be granted a residence permit on the basis of distressing circumstances (article 3.4(3) Aliens Decree).

<sup>17</sup> Procedural safeguards concerning children include: screening by the military police for child-trafficking abuse (para. A1/7.3 in conjunction with para. A5/3.2 Aliens Circular); skeletal bone age-assessment; and child-friendly hearings by officers specifically trained to deal with unaccompanied minors (para. C1/2.9 Aliens Circular and see [https://www.ind.nl/EN/Documents/factsheets\\_asiel.pdf](https://www.ind.nl/EN/Documents/factsheets_asiel.pdf) (accessed 29 January 2016)); there are guidelines for hearing children at the Dutch diplomatic or consular representations ([https://ind.nl/Documents/2015\\_1.pdf](https://ind.nl/Documents/2015_1.pdf) (accessed 29 January 2016)). Cf. Bruin R & Kok SG ‘Het kind in de asielpprocedure: lessen uit internationale rapporten’ [The child in the asylum procedure: lessons from international reports] (2015) 4 *A&MR* 172-7; Beltman D & Zijlstra AE ‘De doorwerking van “het belang van het kind” ex artikel 3 VRK in het migratierecht: vanuit een bottom-up benadering op weg naar een top-down toepassing’ [The direct effect of article 3 CRC concerning the ‘best interests of the child’ in migration law: from a bottom-up approach towards a top-down implementation] (2013) 4 *Journaal Vreemdelingenrecht* 286-308.

<sup>18</sup> However, the Aliens Act may contain specific rules for migration procedures and judicial migration proceedings that deviate from the GALA.

<sup>19</sup> The procedural route for migrants who follow a managed migration procedure is a little different from that for migrants applying for asylum. A migrant child who disagrees with the decision of the IND in the first instance of a managed migration procedure may object directly against this decision at the IND. The lawyer or the migrant then submits a notice of objection containing the grounds of objections. The IND may then invite the objector for a hearing and fully reconsider the decision which had been taken in the first instance. If the objector disagrees with the decision on the notice of objection, he or she may appeal against this decision at the court.

<sup>20</sup> If not, the appeal is declared inadmissible, meaning it is not substantively considered.

In general,<sup>21</sup> the court assesses the decision by means of a marginal test of reasonableness, checking mainly whether the IND's decision is based on sound reasoning, meticulous preparation and a proportional balancing of interests.<sup>22</sup> The court's assessment is included in the judgment by way of legal considerations. If the appeal is declared well-founded, the IND, in most cases,<sup>23</sup> is summoned to retake a decision or a part thereof, taking into account the court's legal considerations. If the IND or the migrant does not agree with the judgment, they may appeal (in last resort) to the (alien's division of the) administrative jurisdiction division of the Council of State, which may judge the lawfulness of the court's judgment.

### *2.1.2 Migration procedures for children seen from a substantive viewpoint*

From a substantive viewpoint, Dutch migration law and (policy) regulations<sup>24</sup> do not contain explicit reference to the obligation under article 3 of the CRC to identify, assess and determine the best interests of the child in migration cases involving children.<sup>25</sup> Nor does the IND, whose primary task is to implement Dutch migration law and (policy) regulations on behalf of the member of government<sup>26</sup> with the portfolio of immigration and asylum (hereafter, Minister),<sup>27</sup> itself directly enforce the legally binding provisions of international conventions.

The authors assume that the IND does follow the Dutch case law regarding article 3 of the CRC (and article 24 of the EU Charter), in which the Dutch administrative courts require the best interests of the child to be expressed in the decision.<sup>28</sup> Whether or not the IND has balanced the interests fairly, though, is not primarily assessed by the court<sup>29</sup> – according to the court, the question of how this should be done has not been specified in the legal migration framework.<sup>30</sup> It appears that in the Dutch legal context the concept of the best interests of the

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<sup>21</sup> Since the realisation of the recast Asylum Procedures Directive (2013/32/EU), the court may fully assess the asylum decisions.

<sup>22</sup> These are the main general principles of sound administration as specified in articles 3:2, 3:4 and 3:46 of the General Administrative Law Act.

<sup>23</sup> Dutch courts may determine themselves that their judgment shall take the place of the annulled decision or the annulled part thereof.

<sup>24</sup> The Aliens Act 2000 (*Vreemdelingenwet 2000*), the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), the Aliens Regulations 2000 (*Vreemdelingenvoorschrift 2000*) and the Aliens Circular 2000 (*Vreemdelingencirculaire 2000*).

<sup>25</sup> Bruin R & Kok SG 'Het kind in de asielpprocedure: lessen uit internationale rapporten' [The child in the asylum procedure: lessons from international reports] (2015) 4 *A&MR* 172-7; Beltman D & Zijlstra AE 'De doorwerking van "het belang van het kind" ex artikel 3 VRK in het migratierecht: vanuit een bottom-up benadering op weg naar een top-down toepassing' [The direct effect of article 3 CRC concerning the 'best interests of the child' in migration law: from a bottom-up approach towards a top-down implementation] (2013) 4 *Journal Vreemdelingenrecht* 286-308.

<sup>26</sup> Such a member is either a State Secretary or a Minister, depending on the ruling government. Since 5 November 2012 the portfolio has been held by a State Secretary, but for the sake of convenience this chapter uses the term 'Minister'.

<sup>27</sup> See <https://ind.nl/EN/organisation/Pages/Organisation.aspx> (accessed 29 January 2016).

<sup>28</sup> Council of State 7 February 2012, *Jurisprudentie Vreemdelingenrecht (JV)* 2012/152.

<sup>29</sup> Nonetheless, the court may sometimes find the IND to have excluded certain child-specific elements from the underlying reasoning, most often with reference to the European Court of Human Rights' case law, for example, in District Court, The Hague, auxiliary location Dordrecht, 15 March 2007, ECLI:NL:RBSGR:2007:BA1321.

<sup>30</sup> Council of State 7 February 2012, *Jurisprudentie Vreemdelingenrecht (JV)* 2012/152.

child, ensuing from article 3 of the CRC, is enforced only as a procedural requirement; article 3 can be regarded therefore as having been only partly implemented.<sup>31</sup>

The same seems true of article 24 of the European Charter of Fundamental Rights (EU Charter), the application of which, contrary to the CRC, is restricted to the implementation of European law (art. 51 EU Charter) in administrative decisions.<sup>32</sup> Furthermore, while several Directives of the European Union with a focus on asylum and immigration law refer to the CRC and the obligation of States Parties to take into account the best interests of the child as a primary consideration,<sup>33</sup> these Directives cannot be relied upon directly because they must be transposed first into national law.<sup>34</sup> In addition, Dutch procedural administrative law appears to prevent judges from calling the Dutch state to account for a failure to implement the CRC (and/or the EU Charter).<sup>35</sup>

Nevertheless, where the best interests of the child in the context of the European Convention on Human Rights (ECHR) are concerned, the outcome can be different. The ECHR does not include a specific provision on the best interests of the child, but – with reference to article 8 of the ECHR, regarding the right to private and family life – the case law of the European Court of Human Rights<sup>36</sup> does set out several substantive elements concerning the best

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<sup>31</sup> Beltman D & Zijlstra AE ‘De doorwerking van “het belang van het kind” ex artikel 3 VRK in het migratierecht: vanuit een bottom-up benadering op weg naar een top-down toepassing’ [The direct effect of article 3 CRC concerning the ‘best interests of the child’ in migration law: from a bottom-up approach towards a top-down implementation] (2013) 4 *Journal Vreemdelingenrecht* 286-308.

<sup>32</sup> The scope of this is still under discussion. See Barkhuysen T & Bos AW ‘De betekenis van het Handvest van de Grondrechten van de Europese Unie voor het bestuursrecht: een actualisatie anno 2014’ [The significance of the Charter of Fundamental Rights of the European Union for administrative law: an update anno 2014] (2014) 2 *JBplus* 96-101 and also De Mol M, Pahladsingh A & Van Heijningen LR ‘Inroepbaarheid in rechte van het Handvest van de Grondrechten van de Europese Unie: Toepassingsgebied en het onderscheid tussen ‘rechten’ en ‘beginselen’ [Legal enforceability of the Charter of Fundamental Rights of the European Union: Scope and the distinction between “rights” and “principles”] (2012) 6 *SEW* 230-235.

<sup>33</sup> For a comprehensive study on the best interests of the child in European Union law, see Smyth C *The Common European Asylum System and the Rights of the Child: An Exploration of Meaning and Compliance* (2013).

<sup>34</sup> Nonetheless, they may be (indirectly) relied on if they are not or insufficiently implemented in national law (see, for instance, Chalmers D, Davies G & Monti G (eds) *European Union Law* (2014)). The principle of the best interests of the child can be found in, for example, article 5 of the Family Reunification Directive (2003/86/EC); article 5 of the Return Directive (2008/115/EC); article 20 of the Qualification Directive (2011/95/EU); article 25 of the Procedures Directive (2013/32/EU); and article 23 of the Reception Directive (2013/33/EU).

<sup>35</sup> Kalverboer ME & Beltman D ‘General Comment nummer 14 in vreemdelingenprocedures: de toepassing van General Comment 14 van het VN-Kinderrechtencomité ter doorbreking van de impasse ten aanzien van het “belang-van-het-kind”-beginsel in vreemdelingenprocedures’ [General Comment number 14 in aliens procedures: the implementation of General Comment number 14 of the UN Children’s Rights Committee to overcome the deadlock with regard to the “best interests of the child”-principle in aliens procedures] (2014) 7-8 *Tijdschrift voor Familie- en Jeugdrecht* 187-193.

<sup>36</sup> For example, *Sen v the Netherlands* European Court of Human Rights, 21 December 2001, available at <http://hudoc.echr.coe.int/eng?i=001-64569>; *Rodrigues da Silva and Hoogkamer v the Netherlands* European Court of Human Rights, 31 January 2006, available at <http://hudoc.echr.coe.int/eng?i=001-72205>; *Üner v The Netherlands* European Court of Human Rights, 18 October 2006, available at <http://hudoc.echr.coe.int/eng?i=001-77542>; *Maslov v Austria* European Court of Human Rights, 23 June 2008, available at <http://hudoc.echr.coe.int/eng?i=001-87156>; *Neulinger and Shuruk v Switzerland* European Court of Human Rights, 6 July 2010, available at <http://hudoc.echr.coe.int/eng?i=001-99817>; *Nunez v Norway* European Court of Human Rights 28 June 2011, available at <http://hudoc.echr.coe.int/eng?i=001-105415>; *Jeunesse v The*

interests of the child that should be taken into account in cases of alleged violation of this provision.<sup>37</sup> Consequently, the Dutch migration legal framework does oblige the IND to apply and assess article 8 of the ECHR.<sup>38</sup>

Moreover, and in respect, too, of asylum and return procedures, the best interests of the child may be part of the assessment regarding the question whether the Netherlands should provide subsidiary protection in the sense of *non-refoulement*, *ex* article 3 of the ECHR.<sup>39</sup> As it is not common for children to be persecuted in the country of origin, an invocation of article 3 of the ECHR is based mainly on the fact that, since the children are especially vulnerable, returning them to the country of origin would lead to an inhumane and degrading situation<sup>40</sup>, for instance in the sense of severe harm in their development they may incur.<sup>41</sup> However, from the case law of the European Court of Human Rights it can (still<sup>42</sup>) be inferred that granting a residence permit under article 3 of the ECHR is a possibility only in extraordinary situations where there is an immediate threat to life.<sup>43</sup>

## 2.2 The dependence of the child on the lawyer

The General Principles of Sound Administration included in the GALA<sup>44</sup> apply as well to decisions made in migration procedures. Because Dutch migration law does not require the IND to identify the best interests of the child, and the IND itself does not feel obliged to

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*Netherlands* European Court of Human Rights, 3 October 2014, available at <http://hudoc.echr.coe.int/eng?i=001-147117>. All judgments were accessed on 29 January 2016.

<sup>37</sup> For example, the best interests and well-being of children, in particular the seriousness of the difficulties which the children are likely to encounter in the country to which they are to be expelled; the age of the child and level of maturity; the social, cultural and family ties the child has with the country of origin and those he has with the host country; the child's health and development; the level of dependency on an adult.

<sup>38</sup> *Ex paras.* B7/3(8) and B9/14 Aliens Circular and *ex art.* 3.6a(1)(a), of the Aliens Decree in conjunction with para. C1/4.1(8) of the Aliens Circular.

<sup>39</sup> *Ex art.* 29(1)(b) Aliens Act in conjunction with para. C2/3(3) Aliens Circular.

<sup>40</sup> For example, *Nasri v France* European Commission of Human Rights, 11 May 1993, available at <http://hudoc.echr.coe.int/eng?i=001-25278>; *D. v The United Kingdom* European Court of Human Rights, 2 May 1997, available at <http://hudoc.echr.coe.int/eng?i=001-58035>; *N. v The United Kingdom* European Court of Human Rights, 27 May 2008, available at <http://hudoc.echr.coe.int/eng?i=001-86490>; *M.S.S. v Belgium and Greece* European Court of Human Rights, 21 January 2011, available at <http://hudoc.echr.coe.int/eng?i=001-103050>; *Sufi and Elmi v The United Kingdom* European Court of Human Rights, 28 June 2011, available at <http://hudoc.echr.coe.int/eng?i=001-105434>; *Tarakhel v. Switzerland* European Court of Human Rights, 4 November 2014, available at <http://hudoc.echr.coe.int/eng?i=001-148070>. All judgments were accessed on 29 January 2016.

<sup>41</sup> See Kalverboer ME & Zijlstra AE *De schade die kinderen oplopen als zij na langdurig verblijf in Nederland gedwongen worden uitgezet* [the developmental harm incurred by long-term resident children when they are forced to return to their country of origin] (2006) available at <http://www.rug.nl/research/study-centre-for-children-migration-and-law/publications/schadenota.pdf> (accessed 29 January 2016).

<sup>42</sup> The high threshold set in the *N. v the United Kingdom* case is under discussion as a consequence of some judgments issued by the European Court of Human Rights in 2015, see <http://strasbourgobservers.com/2015/04/30/s-j-v-belgium-missed-opportunity-to-fairly-protect-seriously-ill-migrants-facing-expulsion/>; <http://strasbourgobservers.com/2015/05/04/moving-away-from-n-v-uk-interesting-tracks-in-a-dissenting-opinion-tatar-v-switzerland/>; and <http://strasbourgobservers.com/2015/09/24/grand-chamber-hearing-in-paposhvili-v-belgium-the-end-of-n-v-the-uk/> (accessed 29 January 2016).

<sup>43</sup> *N. v The United Kingdom* European Court of Human Rights, 27 May 2008, available at <http://hudoc.echr.coe.int/eng?i=001-86490> (accessed 29 January 2016).

<sup>44</sup> Respectively arts. 3:2, 3:4 and 3:46 of the GALA.



identify and assess the child's best interests based on, *inter alia*, article 3 of the CRC, migrant children depend largely on their lawyers to submit their 'best interests'.<sup>45</sup>

The recast Asylum Procedures Directive (2013/32/EU) may alter this situation, as article 10(3)(d) sets out that 'the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as ... child-related ... issues'.

If, on the basis of this provision, a lawyer clarifies to the IND the need for making a best-interests-of-the-child assessment and determination, it may lead to a request from the IND to an expert organisation or a group of experts to draw up an expert opinion on the best interests of the child. When this is done, or when a lawyer submits an assessment report including an expert opinion on the best interests of the child with the application or well before the decision is taken, the IND, according to article 3:2 in conjunction with article 3:4(2) of the GALA, must consider the expert opinion.

Subsequently, according to article 3(46) of the GALA, the best interests of the child which derive from the assessment report should be expressed in the decision. How the submitted interests are weighed up, and what the exact consequences are with regard to the decision, depends largely on the Minister and the IND decision officer acting on his behalf. Hence, it seems, it is up to an individual decision-maker (the IND officer) to make a difference in this regard. Whether or not the report is then put to good use can thus be questioned; this may depend not only on the individual decision officer, but also on how the lawyer submitted the assessment report.

### **3 Method**

#### **3.1 Research design**

In order to evaluate the legal effect of submitting an assessment of the best-interests-of-the-child reports as expert opinions in judicial migration proceedings, we examined cases from a qualitative perspective. This approach allows us to identify issues in the cases under study and understand the meanings and interpretations given to the assessment reports. It also provides an in-depth understanding of the (judicial) processes and considerations with regard to the submission of the assessment reports.<sup>46</sup> For a larger-scale study on the legal effect of best-interests-of-the-child reports in judicial migration proceedings, we selected a total of 63 published judgments issued between 1 January 2006 and 1 January 2014. From these 63 judgments, five cases were included in the preliminary case study. In this section we deal first with how the cases were selected and secondly with how they were analysed.

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<sup>45</sup> Beltman D & Zijlstra AE 'De doorwerking van "het belang van het kind" ex artikel 3 VRK in het migratierecht: vanuit een bottom-up benadering op weg naar een top-down toepassing' [The direct effect of article 3 CRC concerning the 'best interests of the child' in migration law: from a bottom-up approach towards a top-down implementation] (2013) 4 *Journal Vreemdelingenrecht* 286-308.

<sup>46</sup> Hennink M, Hutter I & Bailey A *Qualitative Research Methods* (2011) 9-11.

### 3.2 Case sample selection

63 judgments were selected which had been published on the websites of the Dutch judiciary and Council of State<sup>47</sup> and/or in the online migration law databank of the Foundation for Migration Law Netherlands (*Stichting Migratierecht Nederland*)<sup>48</sup> between 1 January 2006 and 1 January 2014. All judgments were found by searching in the databases using the terms ‘*Kalverboer*’<sup>49</sup> or ‘*orthopedagogisch*’.<sup>50</sup> A selection was then made by including only those cases in which an individual assessment report was submitted by a lawyer as an expert opinion.

From the 63 cases, 25 were chosen for the large-scale study;<sup>51</sup> for the purpose of this present case study, five cases have been selected. In order to create a well-balanced mix, a division was made first on the basis of the final outcome (well-founded vs unfounded cases) and then the type of cases (asylum, family migration, other). All five cases concerned court judgments pronounced between 2009 and 2012. In three of them the Council of State also rendered a judgment; although the latter judgments were not reviewed in detail, the outcomes of these appeal proceedings are mentioned as they provide information about the Council of State’s judgment of the concerned court decisions. Moreover, in cases where the Council of State would have quashed the court judgments, the court’s findings of the assessment report can be considered as irrelevant.

### 3.3 Data analysis

To answer the study’s main question (raised in section 1.3 of this chapter), three types of data were analysed: the five assessment reports in which the Study Centre provides an expert opinion establishing the best interests of the child; the lawyers’ grounds for the appeal, which are included in the notices of appeal; and the five judgments, in which the courts may have deliberated upon the assessment reports in relation to the specific circumstances of the case.

#### 3.3.1 *The assessment report provided by the Study Centre*

In the assessment report, conclusions are drawn up concerning the development of the child and what his or her best interests are in the migration procedures, taking into account future expectations as to residence in the Netherlands or return to the country of origin. The first

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<sup>47</sup> See [www.rechtspraak.nl](http://www.rechtspraak.nl) and [www.raadvanstate.nl](http://www.raadvanstate.nl) (accessed 29 January 2016). Regarding judgments originally published on the website [www.raadvanstate.nl](http://www.raadvanstate.nl), it was found that the Council of State, which is responsible for appeals against the court judgments, had decided to withdraw the preceding court judgment from online publication with the Council of State judgment. As a result, certain of the collected court judgments which had been published on the Council of State’s website are no longer available on the Internet but are available on request via the first author of this chapter.

<sup>48</sup> Until 1 January 2015 this was the FORUM Institute of Multicultural Affairs. See [www.migratieweb.nl](http://www.migratieweb.nl) (accessed 29 January 2016).

<sup>49</sup> The assessment reports are often referred to by the name of the professor concerned.

<sup>50</sup> This is because the reports are written in Dutch and known as ‘orthopedagogic assessment reports’.

<sup>51</sup> In the other 38 cases the lawyer did not submit an individual assessment report, only a general research report published by Kalverboer and Zijlstra in 2006 on the ‘developmental harm incurred by long-term resident children when they are forced to return to their country of origin’. The report, available only in Dutch, is available at <http://www.rug.nl/research/study-centre-for-children-migration-and-law/publications/schadenota.pdf> (accessed 29 January 2016).

stage of the research analysis involved identifying the principal findings of the assessment reports, with the emphasis on the child's current rearing and the future rearing environment as well as any special circumstances in this regard. Secondly, the analysis focused on the best interests which were the most distressing, for instance those regarding the child's mental and physical state; another relevant factor was the extent of integration in Dutch society.

### *3.3.2 The lawyer's grounds for the appeal*

The lawyer may appeal against a decision and refers to the submitted assessment report in his or her notice of appeal. The analysis of these notices of appeal focused on the part in which the grounds for the appeal are substantiated. The documents were studied by selecting all parts that dealt with the child in question: references made to the child's circumstances; references to legal provisions, such as article 3 of the CRC and article 24 of the EU Charter; references to principal Dutch, European or international case law; and, in particular, references to aspects of the assessment report. This analysis provided in-depth understanding of how lawyers submit the assessment reports in judicial migration proceedings.

### *3.3.3 The court's judgment*

We took note of what is included in the judgment<sup>52</sup> concerning the lawyer's grounds for the appeal, especially with reference to the assessment report. From the legal considerations in which the court deals with the lawyer's position, we could deduce what the court's viewpoints were regarding the assessment report in relation to the specific circumstances of the case. As in section 3.3.2 above, the judgments were analysed after selecting references to child-related circumstances; to provisions such as article 3 of the CRC; to Dutch, European or international case law; and to the assessment report and specific parts thereof.

## **4 Analysis**

### **4.1 General remarks**

In this section we examine how lawyers used the main findings established in the assessment reports and analyse the considerations of the court based on the lawyers' grounds for the appeal and the assessment report. In all five expert opinions we came to the conclusion that it is in the best interests of the child to remain in the Netherlands (*ergo* to be granted a residence permit which enables legal residence).<sup>53</sup> Furthermore, it is important to note that in all cases the children concerned have resided in the Netherlands for at least six years, which generally

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<sup>52</sup> The most important parts of the judgments are the position of parties (the adopted lawyer's grounds for the appeal and defence from the IND representative), the court's legal considerations and the court's final decision (*dictum*).

<sup>53</sup> It might also happen that, all circumstances having been considered, the conclusion is that the child's best interests are served by return to the country of origin. However, such a conclusion would probably be reached only in the case of children who have not yet been in the Netherlands for very long. We assume that the longer the child's stay, the greater the chance that an assessment will conclude it is in his or her best interests to remain in the Netherlands.

makes the cases even more distressing as these children often suffer from, *inter alia*, stress, unrelenting suspense, developmental disorders and psychological problems.<sup>54</sup>

In two cases, the appeal was declared unfounded (as well as that at the Council of State) (cases 1 and 2) and in the other three, well-founded (cases 3, 4 and 5). In two of the latter cases, the Minister did not appeal to the Council of State (cases 3 and 5), whereas in the other the appeal at the Council of State was declared unfounded preceding the well-founded appeal at the court (case 4). Three cases thus needed follow-up by the IND, which could either be the granting of a residence permit or a repeat rejection of the application (however, we are not aware of those outcomes).

#### **4.2 Case 1: Kosovo – asylum**

In the first case, which concerned a Roma family from Kosovo that applied for asylum, the lawyer attempted to claim a residence permit based on two legal arguments. The first related to the situation in which two children were placed under a family supervision order, which, according to the lawyer, was reason to issue a residence permit under the CRC. The lawyer did not further substantiate the invocation of the CRC. The court denied this argument on the basis that placement under a family supervision order is not a relevant ground for granting asylum; the court, however, did not address the invocation of the CRC.

The second legal argument concerned the invocation of article 3 of the ECHR and article 15(c) of the EU Qualification Directive<sup>55</sup>. The lawyer supported his invocation by stating that expulsion would lead to the violation of both provisions, since it would result in, *inter alia*, the deterioration of the children's developmental state and irreparable harm, given that they experience medical, psychological, social and emotional problems and have a Roma ethnic background. Although the assessment report, which concerned three individual children, substantiated this statement with child-specific arguments, ones which the lawyer brought forward, the court found that the assessment report contains merely general observations lacking a specific focus on children and that it describes only a 'worrying situation' with regard to the family environment. Consequently, the court stressed that the assessment report does not provide sufficient evidence of an existing life-threatening situation<sup>56</sup> in case of expulsion to the country of origin.

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<sup>54</sup> Geltman PL, Grant-Knight W & Mehta SD et al. 'The "lost boys of Sudan": functional and behavioral health of unaccompanied refugee minors resettled in the United States' (2005) 159(6) *Archives of Pediatrics and Adolescent Medicine* 585-91; Heptinstall E, Sethna V & Taylor E 'PTSD and depression in refugee children' (2004) 13(6) *European Child & Adolescent Psychiatry* 373-80.

<sup>55</sup> Article 15 of Directive 2011/95/EU (the Qualification Directive) concerns 'serious harm' for subsidiary protection. According to article 15, serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

<sup>56</sup> Under the currently applied European Court of Human Rights case law (*N. v The United Kingdom* European Court of Human Rights, 27 May 2008, available at <http://hudoc.echr.coe.int/eng?i=001-86490> (accessed 29 January 2016)), article 3 of the ECHR would be violated if there is evidence of a serious and immediate life-threatening situation.

### 4.3 Case 2: Iran – family migration

The second case dealt with a mother from Iran who sought family life with her husband and son. The IND found she first had to return to Iran to request a provisional residence permit,<sup>57</sup> but the lawyer claimed article 8 of the ECHR would be violated if she were expelled. The lawyer also said the prospective developmental harm to her son, should he remain in the Netherlands with his father, would lead to a violation of articles 3 of the CRC and 24 of the EU Charter. The lawyer submitted the assessment report, along with the mother's psychiatric report. However, he hardly elaborated at all on the content of these reports in relation to articles 8 of the ECHR, 3 of the CRC and 24 of the EU Charter and on the consequences for the son if the mother were not issued a residence permit.

The court rejected his grounds for the appeal, stating first that articles 3 of the CRC and 24 of the EU Charter cannot lead to a right to residence and, secondly, that article 8 of the ECHR is not violated since the IND's decision did not permanently rule out family life. Furthermore, the court considered that, though it could not be expected that the son would join his mother once she was expelled, it was not harmful to him if her expulsion were only temporary. Apparently, in this case the court found that the (impending) separation from mother and her son was not harmful to the son's development, even though experts indicated in the submitted assessment report that it would be. In so doing, the court seemed unable to consider the best interests of the child fairly within the meaning of article 8 of the ECHR.

### 4.4 Case 3: Afghanistan – asylum

Case 3 involved an Afghan family which had lived in the Netherlands for more than 11 years. The lawyer invoked both articles 3 and 8 of the ECHR, and used the assessment report to state, *inter alia*, that the children are 'westernised' and integrated in Dutch society, making it impossible for them to adapt to the living situation in Afghanistan as they were not familiar with the Afghan language and culture. Expulsion, especially of the daughter(s) of the family, would lead to extreme developmental harm. The court subsequently ruled that the assessment report proved that the family had been 'westernised'. According to the court, it could not be expected of the family that they would adapt to life in Afghanistan and thereby prevent a violation of article 3 of the ECHR.

The lawyer substantiated the invocation of articles 3 and 8 of ECHR by adducing several of the assessment report's findings, in particular that the expulsion of the 'westernised' children would cause them severe developmental harm. However, the lawyer's grounds for the appeal could have been made more detailed by referring specifically to the assessment report's findings to lend further support to invocation of those articles; for instance, the lawyer could

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<sup>57</sup> This is a procedure in which the IND assesses the application against the residence conditions while the applicant stays in the country of origin. The provisional residence permit procedure is considered by the IND to last three months, which leads, according to the IND, to a temporary separation. This position was generally accepted by the court, as in, for example, District Court The Hague, auxiliary location Amsterdam, 12 September 2005, ECLI:NL:RBSGR:2005:AU4281 and confirmed by the Council of State, 9 November 2007, ECLI:NL:RVS:2007:BB8353 until the State Secretary's decision of 24 December 2008 (2008/32, *Staatscourant* 2009, no. 1637, 6-7), see Council of State, 30 November 2010, ECLI:NL:RVS:2010:BO6323.

have referred to the mental and socio-developmental problems the children and their parents had in their current child-rearing environment.

Moreover, the lawyer did not rely on articles 3 of the CRC or 24 of the EU Charter. In regard to the invocation of article 3 of the ECHR, the court seems not to have explicitly assessed if there is a life-threatening situation, even though it perhaps did so implicitly. By making use of the assessment report's findings, the court concluded that article 3 of the ECHR stood in the way of expulsion as it could not be expected from the children, especially the youngest daughter, that they adapt to life in Afghanistan. The court took into account that the children had been in the Netherlands from an early age, were raised in a Western society and had never learned Afghan cultural values, and were at an important developmental age; there was also no proof that the children, especially the youngest girl, would be protected on their return, and it was held that expulsion would lead to the denial of their personal identity, formed mainly in the Netherlands. In this regard the court seems to have considered the lawyer's arguments in relation to the assessment report and to have determined that the IND's decision would be in violation of article 3 of the ECHR if the family were expelled to Afghanistan.

#### **4.5 Case 4: Moldova – family migration**

There was a danger that a mother and daughter from Moldova, who were highly dependent on each other, would be separated because the mother did not possess a provisional residence permit (see, too, Case 2 above). The lawyer invoked article 8 of the ECHR and relied on the assessment report to prove that 'more than the normal emotional ties'<sup>58</sup> existed between the mother and daughter. Furthermore, the lawyer stated that return to Moldova would harm the daughter's development.

In this case, articles 3 of the CRC and 24 of the EU Charter were not relied upon; the lawyer, in his grounds for the appeal, could have also mentioned several more findings in the assessment report in order to further substantiate the invocation of article 8 of the ECHR. For instance, he did not delve into the psychological problems of the daughter and her mother and the daughter's suicide attempt. The court considered that the assessment report<sup>59</sup> in fact makes it clear that 'more than the normal emotional ties' existed between the mother and daughter. In this case, the court clearly used the assessment report's findings for the article 8 ECHR assessment by taking into account the daughter's best interests.

It also considered that return would be seriously harmful to the daughter, possibly leading to suicide. Usually this consideration is made only in relation to article 3 ECHR assessments or assessed in the context of article 15(c) of the Qualification Directive,<sup>60</sup> since, legally speaking, it concerns an asylum ground. In the article 8 ECHR assessment at issue, the court apparently took into account the expected child-rearing environment in the country of return

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<sup>58</sup> This is an argument based on the case law of the European Court of Human Rights regarding the family reunification of adults and adult children; see, for example, *Javeed v The Netherlands* European Court of Human Rights, 3 July 2001, Application no. 47390/99.

<sup>59</sup> Regarding this report, the Minister did not deny that it was drawn up by objective experts.

<sup>60</sup> For example, District Court, The Hague, auxiliary location Haarlem, 17 December 2009, ECLI:NL:RBSGR:2009:BK8585.

as this formed part of the evaluation of the best interests of the child as set out in the submitted assessment report.

Furthermore, the court's acknowledgment that the daughter's psychological state made her a highly vulnerable girl unable to hold her own without the presence of her mother – which was also part of the article 8 ECHR assessment – was taken directly from the assessment report's findings. It was thus not the lawyer who had brought this matter to the attention of the court, and the case demonstrates that it may happen that the court applies the assessment report even without any specific reference to it being put forth by the lawyer.

#### **4.6 Case 5: Sri Lanka – distressing circumstances**

The last case concerned a Tamil family from Sri Lanka which had resided in the Netherlands for more than 11 years; here, the children's 'westernisation' also played a big role. The case can be compared to Case 3. The lawyer, however, relied only on article 8 of the ECHR, in particular the right to private life, and on the CRC. The lawyer said article 8 encompasses the right to development, mental health and living where one is rooted and has developed a social identity. The 'westernised' family, it was held, would no longer be able to adapt to the situation in Sri Lanka if they were expelled, but the lawyer did not mention the stress the family was experiencing and the developmental harm the children would suffer if expelled. It seems the lawyer could thus have made greater reference to the assessment report in order to substantiate his invocation both of article 8 of the ECHR and, in particular, of the CRC.

The court found, without reference to the CRC, that the individual best interests of the child outweighs the general interests of the state. In contrast to Case 3, in which the court based its ruling on article 3 of the ECHR, the court found that the right to private life, as per article 8 of the ECHR, would be violated in the event of expulsion. One of the court's main arguments, taken from the assessment report and also brought forward by the lawyer, is that the children's social and identity development occurred chiefly in the Netherlands. Moreover, although the lawyer did not mention this argument, the court took into consideration that expulsion would lead to serious harm being done to the children's development. Legally speaking, this is also (cf. Case 4) a ground that usually would be assessed in the context of article 3 of the ECHR and article 15(c) of the Qualification Directive.<sup>61</sup> In addition, the court took into account the fact that the state had failed to expel the family earlier.<sup>62</sup>

In essence, the court based its ruling on the children's 'westernisation', their participation in Dutch society and their identity and social development in the Netherlands. The fact that it cannot be expected that the children adapt to life in Sri Lanka – which was brought forward by the lawyer and which served as an important argument in Case 3 – was not taken into consideration. Finally, the court referred to the assessment report independently of what the lawyer brought forward (cf. Case 4).

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<sup>61</sup> For example, District Court, The Hague, auxiliary location Haarlem, 17 December 2009, ECLI:NL:RBSGR:2009:BK8585.

<sup>62</sup> Cf. *Jeunesse v The Netherlands* European Court of Human Rights, 3 October 2014, available at <http://hudoc.echr.coe.int/eng?i=001-147117>, under 116 (accessed 29 January 2016).

## **5 Discussion and conclusion**

### **5.1 Introductory remarks**

Having analysed the five selected cases, we reach some preliminary conclusions about the legal effect of submitting a determination of the best interests of the child, as included in an assessment report, in judicial migration proceedings. Accordingly, in this section we answer the case study's main and sub-questions.

### **5.2 Preliminary conclusions**

#### *5.2.1 How the lawyer submits the assessment report and how the court deals with it*

Regarding the way the lawyers submitted the assessment report, we cannot draw an unambiguous conclusion. Although in all five cases the lawyers brought forward one or more parts of the assessment report by invoking various legal provisions, in most of the cases we find that the lawyers could have referred more specifically to the assessment report's findings in order to further substantiate their legal arguments. Especially with regard to the current and future psychological and developmental situation of the children, it seems the lawyers could do better by making proper transpositions of these findings into specific legal terms. We assume that, if the lawyers would have expounded on the invocation of articles 3 and 8 of the ECHR with more specific reference to the assessment reports, the court could have had more points of reference for assessing these provisions, including the best interests of the child within the meaning of articles 3 of the CRC and 24 of the EU Charter.

Furthermore, it is striking, particularly in comparing Cases 1 and 2, that in Cases 4 and 5 the court took into consideration various findings in the assessment reports that were not put forward by the lawyer. Although it is the court's task to consider a submitted expert opinion in the legal context of the whole case, we assume that a case will benefit from a lawyer who makes a good legal 'translation' of the social behavioural conclusions in the assessment reports in order to facilitate the court's engagement with them in its judgments. If the assessment reports are not adequately 'translated' by the lawyers, the risk is that the reports will not be balanced properly by the courts. By doing so, the lawyer prevents a situation in which the migrant children have to depend on the good understanding and transposition of the assessment report by the court. Moreover, we assume that the more the lawyer refers to specific findings from the assessment reports, the more it strengthens the appeal. Lawyers could use General Comment No. 14<sup>63</sup> for assistance in making a 'translation'.

Furthermore, regarding the way the court deals with the submitted assessment reports, we come to the preliminary conclusion that the courts seem to take the expert opinions into consideration arbitrarily. On the one hand, we find that while the court does consider the

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<sup>63</sup> See Kalverboer ME & Beltman D 'General Comment nummer 14 in vreemdelingenprocedures: de toepassing van General Comment 14 van het VN-Kinderrechtencomité ter doorbreking van de impasse ten aanzien van het "belang-van-het-kind"-beginsel in vreemdelingenprocedures' [General Comment number 14 in aliens procedures: the implementation of General Comment number 14 of the UN Children's Rights Committee to overcome the deadlock with regard to the "best interests of the child"-principle in aliens procedures] (2014) 7-8 *Tijdschrift voor Familie- en Jeugdrecht* 187-93.



assessment report, it may trivialise the latter and its findings. In Case 1 the court interprets the assessment report's content as general observations merely describing a 'worrying situation', even when the assessment report specifically describes the current and future developmental harm with regard to the concerned children. In Case 2, a (temporary) separation from the mother is not considered harmful to the child even when the expert opinion states the contrary. On the other hand, the court acknowledges the assessment reports as expert opinions (Case 4) and, moreover, assesses and applies the assessment reports even when a lawyer does not refer to specific findings. With regard to highly vulnerable children, we find it deplorable that courts consider the expert opinions in such an apparently arbitrary fashion.

Concerning the invocation of the CRC, the above analysis shows that the courts do not really assess the CRC, notwithstanding that the lawyers could have done better to substantiate the invocation of article 3 of the CRC (as in Case 1, for example). It is likely that the reason why lawyers placed so little reliance on articles 3 of the CRC and 24 of the EU Charter is that they know this will not stand a chance in court (see section 2.1.2 above). Indeed, under the current Dutch legal migration framework and administrative practice, article 3 of the CRC does not provide an independent claim to a residence permit, although the best interests of the child in the context of articles 3 or 8 of the ECHR may very well lead to lawful residence, which appears to be true in the Cases 3, 4 and 5. Many of the assessment report's findings can be connected to articles 3 and 8 of the ECHR. Given that, in terms of current Dutch case law, article 3 of the CRC and article 24 of the EU Charter seem to be 'off-side' when they are invoked separately, they could be better used as accessory rights in order to substantiate the best interests of the child in the context of articles 3 and 8 of the ECHR. Also in this regard, lawyers could rely on General Comment No. 14 in order to lend further support to these best-interests-of-the-child provisions.<sup>64</sup>

### *5.2.2 The legal effect of submitting assessment reports in judicial migration proceedings*

With regard to the legal effect of submitting the assessment reports, we come to the following (preliminary) conclusions. First, it is striking that families with children who have, according to the court, been proven to be 'westernised' and integrated in Dutch society may be granted a residence permit if they rely on either article 3 or article 8 of the ECHR, in particular the right to private life.

In this regard, Cases 3 and 5 are substantially comparable. In both cases the court relies fully on the assessment reports and takes into consideration that the children have been in the Netherlands from an early age; that their development mainly took place in the Netherlands; and that expulsion would lead to serious developmental harm. However, in Case 3 the court considers that expulsion would lead to a violation of article 3 of the ECHR, and in Case 5 it

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<sup>64</sup> In particular, paras. 55, 56, 60, 61, 65, 66, 70-6 and 84. See Kalverboer ME & Beltman D 'General Comment nummer 14 in vreemdelingenprocedures: de toepassing van General Comment 14 van het VN-Kinderrechtencomité ter doorbreking van de impasse ten aanzien van het "belang-van-het-kind"-beginsel in vreemdelingenprocedures' [General Comment number 14 in aliens procedures: the implementation of General Comment number 14 of the UN Children's Rights Committee to overcome the deadlock with regard to the "best interests of the child"-principle in aliens procedures] (2014) 7-8 *Tijdschrift voor Familie- en Jeugdrecht* 187-93.

rules that expulsion would lead to a violation of the right to private life in the sense of article 8 of the ECHR. In Case 3, the court also takes into account that it cannot be expected from the children to adapt to life in Afghanistan; that expulsion would lead to denial of their personal (Dutch) identity; and that there was no proof that the children would be protected in Afghanistan. In contrast, in Case 5 the court also bases its ruling on the children's participation in Dutch society and the fact that the state had failed to expel the family earlier.

From a legal point of view it is obvious that in Case 5, concerning the right to private life, the court focused more on the situation in the Netherlands, whereas in Case 3 it devoted more attention to the expected child-rearing environment in the country of origin. We assume that the situation in the return country was more distressing in Case 3 than in Case 5, which was the reason why the lawyer placed more emphasis in the appeal on article 3 of the ECHR than on article 8 (although the lawyer actually relied on both of these provisions). The lawyer in Case 5 probably invoked article 8 of the ECHR instead of article 3 because the latter has a high threshold in order to make for a successful appeal. In this regard, under article 3 of the ECHR the best interests of the child have to concern a (proven) immediate life-threatening situation (see Cases 1 and 3) to conclude that this provision is violated (see section 2.1.2). However, from Case 3 we gather that this life-threatening situation can be at issue implicitly if one can show (with an expert opinion on the best interests of the child) that a 'westernised' child,<sup>65</sup> having reached an important developmental age, would not be able to adapt to life in the country of return; that there is no proof that the child would be protected in the country of return; and that expulsion means the denial of personal (Dutch) identity.

With regard to Case 1, the court did not take into account the children's current and future developmental state in the article 3 ECHR assessment. Perhaps it was of the opinion that the country of origin, in this instance Kosovo, is, in comparison to Afghanistan in Case 3, not a country in which the deterioration of the children's development would lead to an immediate life-threatening situation. If the threshold is hard to meet (see Case 1), an expert opinion on the best interests of the child that also includes child-specific evidence of the expected return environment may be helpful.<sup>66</sup>

Furthermore, in Case 2, the court, with regard to the provisional residence permit procedure, judges that a temporary separation of the family is not contrary to article 8 of the ECHR. However, we assume that if the lawyer would have shown or proven that it would not be a temporary separation, the court could have come to a different conclusion. An assessment report on the best interests of the child could then have provided evidence that a separation for an indefinite period of time is seriously harmful to the development of the child. Cases 4 and 5 show that an assessment report that elaborates on the best interests of the child can play a decisive role in the article 8 ECHR assessment. Lastly, it is remarkable that, in assessing

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<sup>65</sup> In this case, we understand from the court that 'westernised' children are those who have been in the Netherlands from an early age, have been raised in a Western society, and who have never learned the language and cultural values of the country of return.

<sup>66</sup> Zevulun D et al. (in progress) 'The living situation and well-being of asylum-seeking children after return to Kosovo and Albania' (provisional title).

article 8 of the ECHR in these two cases, the court takes into account the harm the child incurs if expelled; usually this is considered only in asylum cases where it may be a ground for *non-refoulement*, within the meaning of, *inter alia*, article 3 of the ECHR.

## 5.2 Final remarks

We can (preliminarily) conclude from this case study that the submission of assessment reports by lawyers in judiciary proceedings definitely could have a positive legal effect for migrant children. The analyses show that an assessment report submitted in judicial migration proceedings may lead to a substantive consideration of the best interests of the child by the court, especially in relation to articles 3 and 8 of the ECHR. We assume that this conclusion will hold in the large-scale study too. Furthermore, we find that by submitting assessment reports in judicial migration proceedings the quality of decision-making is improved, as the rights of the child seem to be better off.

However, there is still a long way to go before we are able to conclude that the best interests of the migrant child are fully taken into account in the Netherlands. In order to come closer to achieving this goal, it is essential that the IND and the judiciary accept their responsibility in respecting the rights of the child as enshrined in European and international legislation, *inter alia* by taking into consideration the ‘best interests of the child’ procedurally as well as substantively and, in so doing, taking due account of the minor’s well-being and social development, as has been instructed in several asylum and immigration law Directives of the European Union (section 2.1.2). In addition, lawyers can and should do better in representing their vulnerable clients to the best of their ability, given that under the Dutch migration law framework migrant children depend entirely on them for the identification and submission of their best interests.

As a first step towards this, we recommend that all the actors embrace General Comment No. 14, since this document can be used as guidelines to substantively assess and determine the best interests of the child.<sup>67</sup> Moreover, lawyers may base the need for the authorities to conduct a best-interests-of-the-child assessment on article 10(3)(d) of the recast Asylum Procedures Directive (2013/32/EU) (section 2.2).

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